

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PROVIDENCE HEALTH & SERVICES-)
OREGON, an Oregon nonprofit)
4 corporation, dba Providence)
Portland Medical Center,)

5 Plaintiff,)

Case No. 3:17-cv-00430-MO

6 v.)
7)

8 SANJANA PAHALAD MANCUSO,)
personal representative of the)
Estate of Rattan Kumar)
9 Pahalad, in her official and)
personal capacities, and ELAP)
10 SERVICES, LLC, a Delaware)
limited liability company,)

July 12, 2017

11 Defendants.)
12)
13)
14)
15)
16)

Portland, Oregon

17 **Oral Argument**

18 TRANSCRIPT OF PROCEEDINGS

19 BEFORE THE HONORABLE MICHAEL W. MOSMAN

20 UNITED STATES DISTRICT COURT CHIEF JUDGE
21
22
23
24
25

APPEARANCES

FOR THE PLAINTIFF: Mr. Arden J. Olson
Harrang Long Gary Rudnick, PC
360 E. 10th Avenue, Suite 300
Portland, OR 97401-3273

FOR THE DEFENDANTS: Mr. Kristopher R. Alderman
Fisher Broyles
945 East Paces Road, Suite 2000
Atlanta, GA 30326

Ms. Mary-Anne S. Rayburn
Gordon & Polscer, LLC
9755 S.W. Barnes Road, Suite 650
Portland, OR 97225

COURT REPORTER: Bonita J. Shumway, CSR, RMR, CRR
United States District Courthouse
1000 S.W. Third Ave., Room 301
Portland, OR 97204
(503) 326-8188

(P R O C E E D I N G S)

THE CLERK: Your Honor, this is the time and place set for oral argument in Case No. 3:17-cv-430-MO, Providence Health & Services-Oregon v. Mancuso, et al.

Counsel, can you introduce yourself for the record.

MR. OLSON: Arden J. Olson for the plaintiff, Providence.

MR. ALDERMAN: Your Honor, Kris Alderman and Mary-Anne Rayburn for the defendants.

MS. RAYBURN: Good afternoon, Your Honor. Mary-Anne Rayburn.

THE COURT: Thank you all for being here. I want to lay out my tentative thoughts and then I'll hear your responses.

First, I think it's important in this case to decide -- or to keep in mind the difference between complete preemption and conflict preemption, since the former provides a vehicle for federal question jurisdiction, and impacts, therefore, the question of removal and remand, and the latter provides only a defense but does not create federal question jurisdiction. And the cases don't always make clear distinctions between those two concepts, so I think we have to try to do so here.

The parties have argued the case both as to the specific elements of *Barr v. Ross Island*, and I would say also

1 on a broader level, just somewhat descriptively, that is, the
2 parties have talked about whether this claim really is an ERISA
3 claim in disguise, in the guise of a UTPA claim and, you know,
4 whether it's what really is going on here.

5 The way I think about it is that's a useful concept
6 to keep in mind, is this an ERISA claim in disguise, but the
7 two-part test of *Barr v. Ross Island* is designed to capture
8 exactly that, that any time there is an ERISA claim in disguise
9 as a state statutory or even common law claim, the test will
10 pick that up.

11 So what I need to do, I think, and also because the
12 Ninth Circuit has so counseled, is to keep in mind this
13 two-part test.

14 So the first of the two-part -- the first prong is
15 whether the plaintiff here at some point in time could have
16 brought the relevant claim -- the third claim here -- under
17 ERISA. And that's claim-focused, and it's also, I think,
18 plaintiff-focused; that is, it's could plaintiff have brought
19 this claim under ERISA, not could plaintiff have brought a
20 claim under ERISA.

21 I think it's likely here, just by way of digression,
22 that by virtue of the assignment, if for no other reason, there
23 is an ERISA claim that this plaintiff could have brought.
24 That's really not the question *Barr v. Ross Island Sand &*
25 *Gravel* asks, it's could this claim have been brought as an

1 ERISA claim.

2 And so there, I think, thus circumscribed, my
3 tentative view is that the answer to that question is no, that
4 the claim being brought here is not one that could have been
5 brought as an ERISA claim.

6 The primary contrary argument that ELAP makes here
7 centers on the remedy, and there are -- I am concerned, in
8 terms of conflict preemption, about the injunctive relief
9 sought here. Some portions of the injunctive relief I think
10 clearly invoke ERISA, but the analysis as to whether this claim
11 could have been brought under ERISA is claim, not remedy
12 focused. It's really not possible to apply the two-part test
13 of *Barr v. Ross Island* to remedies.

14 Now, we can talk later about the true nature of those
15 remedies, but in any event, my own tentative view is that this
16 claim couldn't have been brought as an ERISA claim.

17 So that's enough. You have to get past both hurdles
18 of *Barr* to get to complete preemption, and the answer no to the
19 first prong is probably enough, but I'll move to the second
20 prong just because they're useful to think about together.

21 The second one is does the claim that is being
22 brought invoke an independent legal duty under the UTPA --
23 "independent" meaning a duty not bound in ERISA. And again
24 here, I think the answer to that question is tentatively yes.

25 It's true as far as it goes that *Metropolitan Life*

1 suggests that there are obligations found in general common law
2 claims or I would say state statutory claims, claims of general
3 application that can interfere with ERISA rights and duties,
4 but that's not the question *Barr* is asking, and the *MetLife*
5 case cited by ELAP here is actually a conflict preemption case.
6 So once again, we're at that point of bifurcation, where I'm
7 trying to focus on the existence vel non of complete
8 preemption.

9 So I believe the answer to both of those questions
10 being no means that there's no complete preemption. As I've
11 said, I'm not sure the assignment plays a big role, because
12 even if it's true that the assignment could have allowed for an
13 ERISA claim to be brought, the plaintiff is free to elect not
14 to bring an ERISA claim and seek some other remedy.

15 Probably the occasion where one most sees this case
16 as pled, bringing up ERISA, is in the injunctions A, B, and D,
17 which directly implicate ERISA. As I've said, I don't think
18 that's where I look to find complete preemption. I think it's
19 where I will eventually have to look some day, or rather some
20 court will have to look to find conflict preemption.

21 So I'd like to go that far with my tentative
22 analysis. I'll let the defendants respond first, since the
23 ball is sort of in their court, and then if we get that far,
24 then we'll talk about their request for attorney fees.

25 Go ahead.

1 MR. ALDERMAN: Thank you, Your Honor. I appreciate
2 you outlining your tentative thoughts. I've argued a lot of
3 these motions and have not gotten those tentative thoughts in
4 advance. It's helpful to have those and now try to make my
5 case a little stronger.

6 THE COURT: I'm just here to make your life easier in
7 any way I can.

8 MR. ALDERMAN: I appreciate that, Your Honor.

9 The reason I think it's important to look at the
10 remedy they're asking for is because although they have
11 enumerated only three claims or three causes of action in their
12 complaint, the third cause of action, which is the one directed
13 at ELAP, really asks for a lot of different types of relief.
14 In my mind, they're really a lot of different claims, a lot of
15 different causes of action.

16 I think that --

17 THE COURT: Why do you say that? Because a claim, a
18 single claim, something that everybody agrees is a single claim
19 can seek various remedies without branching out into becoming
20 more than one claim, right?

21 MR. ALDERMAN: I'd agree with that premise, Your
22 Honor.

23 THE COURT: Why is this case different?

24 MR. ALDERMAN: In this particular instance, the
25 reason I think that's different is there is -- the UTPA claim

1 is premised, in my mind, on alleged misrepresentations that
2 ELAP made to various parties, and from that, they're asking for
3 relief in the way of damages that they can show have been
4 suffered by the hospital as a result of those
5 misrepresentations.

6 But they also ask for different types of relief that
7 don't stem from those misrepresentations. So those -- that --
8 those categories of relief can't be tied to that UTPA claim
9 because the constructive trust claim -- I'll call it a claim --

10 THE COURT: Let me stop you there. That's an
11 interesting argument and I'd like to ask you this. Let's
12 assume you're right that there's a UTPA claim that for purposes
13 of my hypothetical only you'll acknowledge is a straight-up
14 state claim not an ERISA claim in disguise, and it seeks the
15 sort of classic UTPA relief, but on top of that it seeks
16 ERISA-based relief, you know, a declaration, for example, that
17 the plan underpaid its beneficiary, the decedent, something
18 like that.

19 Why would that be the case then, not that there's two
20 claims now in the case, an ERISA claim and a UTPA claim, but
21 just that there's a form of relief that the UTPA claim doesn't
22 warrant and you'd strike the relief from the case? In other
23 words, why does seeking non-UTPA remedies amount to an ERISA
24 claim as opposed to too many remedies under the UTPA?

25 MR. ALDERMAN: So I think the answer to that question

1 is that the -- if the relief is stricken, as you suggest, then
2 essentially, in my view, the claim is stricken, which would be
3 an acceptable result, because what they're asking for is
4 essentially an ERISA claim for benefits. But a constructive
5 trust claim says enter an order holding in constructive trust
6 all monies that should have been paid under the plan, according
7 to the terms of the plan. And that's just a classic ERISA
8 claim for benefits.

9 If that's struck -- and I don't know the procedural
10 mechanism for doing that, because we're talking all
11 hypothetical now, but if that's struck, then essentially what
12 we're asking for has been granted --

13 THE COURT: Well, I'm asking a slightly different
14 question, although that's a useful answer. But let's say
15 someone brings a breach of contract claim and says, I want my
16 contract damages, you know, the ones actually bargained for in
17 the contract, and I also want consequential damages and I want
18 emotional distress damages.

19 And you say, well, you can get one and two, but you
20 just can't get three for breach of contract. Your argument
21 would not be -- it seems to me you've asked for damages you
22 just can't get. Your argument would be, oh, they're seeking a
23 claim for intentional infliction of emotional distress, but why
24 would you use a remedy not available under the claim that's in
25 the complaint as a reason for saying, well, the complaint is

1 actually making a second whole new claim instead of just
2 saying, well, they just asked for a remedy they're not entitled
3 to get?

4 MR. ALDERMAN: Sure, I understand -- I understand
5 your question. I think if this was not a situation where, in
6 my mind, ERISA complete preemption is implicated, what we would
7 have done in state court is simply filed a motion to dismiss
8 those requests for relief, saying they're not available, which
9 that is what you do in the breach of contract cases.

10 THE COURT: Right.

11 MR. ALDERMAN: The reason this is different is
12 because they've sought relief, essentially made a claim that
13 can only be brought under ERISA, because of ERISA --

14 THE COURT: Well, I mean, words matter. They haven't
15 made a claim that can only be sought under ERISA. They've
16 asked for relief that possibly conflicts with ERISA, right?

17 MR. ALDERMAN: I understand the premise of that
18 question, but I don't agree with it.

19 THE COURT: I take that because they, for example,
20 sought relief that enjoins you, your client, directly or
21 through its administrator, from representing to anyone really
22 that Providence's charges exceed the plan's allowable limits,
23 you think because they asked for that that they're making an
24 ERISA claim? That's effectively making an ERISA claim?

25 MR. ALDERMAN: I think they have made a couple of

1 claims that are ERISA claims, and that is one of them. I think
2 the easiest one to look at is the paragraph 5 of their prayer
3 for relief, the constructive trust. That is a claim for ERISA
4 benefits. They're asking for an order holding in constructive
5 trust, which is the same as an order ordering ELAP to pay the
6 benefits that should have been paid under the terms of the
7 plan.

8 THE COURT: Well, let's talk about the constructive
9 trust, then. Why doesn't that play out like this: That
10 Providence says, we take no position on what should or
11 shouldn't be paid out to the estate here, just whatever gets
12 paid out ever to the estate, since the estate owes it to
13 Providence, we want the Court to order ELAP to pay it or hold
14 it, at least, for Providence. That's just what a constructive
15 trust is, right? It doesn't seek to litigate the underlying
16 dispute now between the estate and ELAP, it just says whatever
17 comes out of that dispute, we don't care what the plan says, it
18 might be zero, we take no position on whether it's zero or
19 \$100,000, but whatever comes out of it, since the decedent owed
20 it to us, let's not let it disappear to the decedent.

21 Isn't that what the constructive claim is about?

22 MR. ALDERMAN: I believe the constructive trust claim
23 is making an affirmative claim that some amount of money is
24 owed.

25 THE COURT: How much and why?

1 MR. ALDERMAN: I don't know how much because there's
2 been no demand. Actually, there's been no demand as to any of
3 the claim as to how much. There's been no indication on what
4 damages were suffered on any parts of the claims.

5 THE COURT: Well, so you don't know from the
6 constructive trust whether your opponent takes any position
7 based on any particular reading of the plan that any particular
8 amount is owed, right?

9 MR. ALDERMAN: That's correct.

10 THE COURT: I understand your argument, and it's not
11 a frivolous one, that because of the nature of the relief being
12 sought, you think that amounts to a claim. How do I apply *Barr*
13 *v. Ross Island* as to that claim? You say that the relief kind
14 of -- sort of calls into existence an ERISA claim. So how does
15 that play out under *Barr*?

16 MR. ALDERMAN: Sure, Your Honor. I think -- let me
17 start by saying -- and I may have touched on this earlier, but
18 there is no allegation of a misrepresentation or statement made
19 by ELAP that would have any relationship to whether any more
20 money is owed under the terms of the plan, making this to me
21 again a wholly separate claim, because no matter what ELAP may
22 have said about anything alleged in the complaint, it would not
23 change the amount in the plan that should have been paid. It
24 wouldn't change the terms of the plan. So I see these as two
25 just completely separate things.

1 THE COURT: Well, it might change the amount the
2 estate pays Providence, right? The UTPA theory is quit telling
3 the estate that they don't owe us money; they do. Isn't that
4 the UTPA theory?

5 MR. ALDERMAN: Yes, Your Honor. And I think there is
6 a way to plead that claim, and there are valid state law claims
7 that are not completely preempted by ERISA in the complaint.
8 And we've identified, in our opposition papers, we've
9 identified three parts of the claim that we think are claims
10 for ERISA benefits or are claims that could have been brought
11 under ERISA and don't implicate any other duties other than
12 ERISA.

13 THE COURT: Well, let me ask you this. If the relief
14 sought under the UTPA had been more circumscribed, seeking
15 only, for example, an injunction against communicating with the
16 estate about how much they should pay Providence, would that be
17 a straight-up UTPA claim with no complete preemption?

18 MR. ALDERMAN: Without seeing it, Your Honor, yes, I
19 believe it would.

20 THE COURT: I guess what I'm getting at is you are
21 basing your idea that the UTPA claim is subject to preemption
22 based on the remedies it seeks, not on the actual nature of the
23 claim itself, right, separate from the remedies it seeks?

24 MR. ALDERMAN: I don't think it's separate because
25 there are too many parts of their claim, because the remedy

1 they're seeking, the plan benefits, is not tied at all to the
2 allegations they make. They're asking for plan benefits and
3 they're talking about misrepresentations, which are two
4 separate things. So they have to be saying -- at least I
5 understand they have to be saying that the plan underpaid what
6 it should have paid, therefore they want a constructive trust
7 around that money so that they can get paid that amount of
8 money.

9 THE COURT: Well, I guess why can't it be that the
10 decedent underpaid the -- the estate underpaid what it should
11 have paid, so if anybody on earth is going to give the estate
12 money, let's make sure the Court is aware that that's happening
13 so that the money goes from the estate to Providence.

14 Why does it have to be anything to do with the plan?
15 Why can't they just say that the entity that has underpaid here
16 is the estate to Providence?

17 MR. ALDERMAN: They could, and I think they did in
18 state court initially. They initially filed an original
19 complaint that had two claims against the estate and the
20 administrator of the estate, and now they've replied that with
21 an amended complaint that has claims against ELAP, and is
22 asking ELAP to essentially pay through a constructive trust the
23 amount of benefits that should have been paid under the terms
24 of the plan.

25 THE COURT: All right. Thank you very much.

1 MR. ALDERMAN: Thank you, Your Honor.

2 THE COURT: Your response?

3 MR. OLSON: Yes, Your Honor. Obviously, I agree with
4 much of what you said in your preliminary comments. Several
5 things I wanted to just emphasize. They confused jurisdiction
6 and standing in their brief. I don't know if Your Honor wants
7 to hear anything about that, but when we're talking complete
8 presumption as opposed to some other kind of a case, this is a
9 jurisdictional problem, and they're attempting to make it go
10 away by saying this is just a standing issue.

11 And then to argue in their brief that election
12 doesn't even matter whether the assignment was effective and
13 this claim could have been brought under the first prong of the
14 test is simply a nonstarter. I think Your Honor is exactly
15 right that this claim needed to be brought under ERISA in order
16 for the first prong of the complete preemption to apply.

17 And if you look at Section 1132 and the *DB Healthcare*
18 case that we cited, Your Honor, it clearly establishes that
19 Providence is not a beneficiary such that under 1132(a)(1)(B),
20 Providence could not have brought a claim against the plan here
21 unless it was a claim by assignment. And we went through in
22 the brief of why the assignment didn't accomplish that here.

23 THE COURT: So you're not bringing any claim by
24 assignment, right?

25 MR. OLSON: We're not bringing any claim by

1 assignment.

2 THE COURT: Is your constructive trust asserting that
3 the plan owes the estate more money?

4 MR. OLSON: We don't know, Your Honor.

5 THE COURT: You don't know if your claim is asserting
6 that?

7 MR. OLSON: We don't know whether the plan owes the
8 estate more money. What we want -- what that constructive
9 trust claim is about is whatever is owed ought to be paid the
10 plan, and in the first instance --

11 THE COURT: Which might be zero?

12 MR. OLSON: Might be zero.

13 THE COURT: As far as you know?

14 MR. OLSON: We don't know.

15 In the first instance, that's a problem between the
16 estate and the plan and its plan administrator, ELAP. They've
17 denied the claim. The estate still has time within the
18 statute, the three years that they give them to file a federal
19 lawsuit. Whether they do that will remain to be seen, but in
20 the first instance, they're the ones that have to work out
21 what's owed or what's not owed. We're not party to that plan
22 and we haven't brought a claim against that plan, and in fact
23 our claim against ELAP isn't against the plan at all, it's
24 against ELAP for their statements to the estate and our
25 patient, essentially our -- the successor to our patient, the

1 estate of the patient over disparaging our pricing structure.
2 And that isn't about anything related to the level of benefits
3 in the plan. It has to do with disparaging our pricing.

4 THE COURT: How is the remedy of a constructive trust
5 related to disparaging your pricing structure?

6 MR. OLSON: I believe that because of their, I think,
7 wrongful, inequitable conduct, that if there is money owing, a
8 state court exercising equity jurisdiction could decide that if
9 they hold monies that are owed to the estate, they should hold
10 them for us, because we are entitled to whatever is available
11 here.

12 THE COURT: So it's, in your view, a substitute for
13 damages normally sought? You could just say, you've disparaged
14 our pricing structure, we've been harmed by that, and so you
15 owe us \$100,000?

16 MR. OLSON: Under the UTPA, there is a concept called
17 ascertainable loss, which is the closest thing that's analogous
18 to damages, but that's a fairly focused remedy, and it isn't
19 really a damages remedy, it's a statutory remedy. It's not
20 like a contract damages remedy. The UTPA does give this
21 equitable power to the court sitting in equity to impose other
22 remedies.

23 THE COURT: What are your losses under the UTPA?

24 MR. OLSON: Well, certainly some of the costs of what
25 we've had to go through to collect, is what we've pled, and

1 what I believe are recoverable under the UTPA, and whether
2 there's more than that -- whether, for example, we have the
3 right to claim something else that flowed from that
4 misrepresentation is a series of circumstances that we need to
5 explore in discovery and pleading in the state court, but none
6 of that is an ERISA remedy.

7 Now, in order to have the ERISA remedy, you have to
8 have someone who has the capability under the first part of the
9 test of bringing an ERISA claim, and that's not us; and the
10 second has to be no independent duty. Well, the independent
11 duty is the one set out by the UTPA that applies regardless of
12 whether it's an ERISA plan, and is actually not being asserted
13 against the plan, it's being asserted against ELAP.

14 THE COURT: So your contention on the duty is that it
15 doesn't require any embodied understanding or contractual
16 relationship or anything like that for that freestanding UTPA
17 duty to exist, right?

18 MR. OLSON: It's a statutory duty. It's a statutory
19 duty not to disparage our goods and services.

20 THE COURT: And then if I have your argument right,
21 there are really two contingencies built into getting any money
22 out of your sought relief of a constructive trust. First --
23 first, I guess, is that there are UTPA damages beyond the
24 damages involved in seeking collection; and second, that there
25 is some sort of money owed by the plan itself through its

1 administrator to the estate?

2 MR. OLSON: For there to be constructive --

3 THE COURT: If the answer to either is zero, then
4 there's no constructive trust but no money paid?

5 MR. OLSON: It's a very separate question when we get
6 back into the merits of this case whether or not we will be
7 able to demonstrate the damages that we would like to assert.
8 And when I say "damages," what I mean is equitable relief. In
9 the state court, that doesn't go to whether or not this was an
10 ERISA claim, it just goes to whether we can prove our claim in
11 state court.

12 THE COURT: So you acknowledge, I suppose, that
13 injunctions A, B, and D do seem to -- I'll just say invoke
14 ERISA, right?

15 MR. OLSON: Actually, I don't agree that they invoke
16 ERISA.

17 THE COURT: It's not really a question for today. I
18 guess I'm just trying to nail down your position. There is, at
19 least, an issue of conflict preemption raised by these three
20 paragraphs, right?

21 MR. OLSON: There might be. I don't agree that there
22 is, but, for example, A, we're asking for an injunction that
23 they stop representing to our patients that appeal rights under
24 the patient's plan apply also to the providers of the services.
25 We think that's a misrepresentation of the law as applied to

1 our patients, and it's contrary to the *DB Healthcare* case,
2 where --

3 THE COURT: What about B?

4 MR. OLSON: And representing to PH&S-O or its
5 patients that provider charges exceed the plan's allowable
6 claim limits.

7 THE COURT: Do you have to interpret the plan to get
8 that far?

9 MR. OLSON: We might have a conflict preemption issue
10 there.

11 THE COURT: So your answer for today's purposes is
12 that's at worst for you conflict preemption, not complete
13 preemption?

14 MR. OLSON: Correct.

15 THE COURT: And this idea that seeking an ERISA
16 conflicting remedy sort of operates backwards to create an
17 ERISA claim, what do you make of that?

18 MR. OLSON: That's -- the first prong of the
19 standards is that liability must be asserted. The claim must
20 seek liability that is only available under ERISA. It isn't
21 about damages. And they're trying to turn the damages thing
22 into a claim, as Your Honor was appropriately pointing out. I
23 don't think that satisfies the first prong of the test.

24 THE COURT: The test being the *Barr v. Ross Island*
25 test?

1 MR. OLSON: Yeah. I think of it as the *Aetna v.*
2 *Davila* test.

3 THE COURT: Also?

4 MR. OLSON: Also. So that's the test we're here on.

5 THE COURT: All right. Thank you very much.

6 MR. OLSON: Thank you.

7 THE COURT: I'll give you the final word, sir.

8 MR. ALDERMAN: Thank you, Your Honor.

9 I don't have a lot to add. I just want to kind of
10 get back to this idea of what is a claim and what is relief. I
11 think it's possible to have a situation like you described
12 earlier, where there's one set of facts that leads to several
13 types of relief, and maybe in your contract claim example
14 somebody feels like because they breached the contract, I had
15 all of this emotional harm, and they tie that emotional harm
16 back to the breach of contract. For legal reasons, that
17 doesn't work, we know that, but they are tying the relief
18 they're asking for to the harm that they're alleging.

19 In this case, there is absolutely no way to tie the
20 relief that they're asking for on the constructive trust --
21 that is, additional plan benefits being paid -- to the harm
22 they're alleging, because as I said earlier, there's no way,
23 even if they proved every allegation they have in this
24 complaint about a misrepresentation, there's no way that
25 they -- the result of that is more money should be paid under

1 the terms of the plan. That's why I see these as separate and
2 distinct claims, because there's no way to tie the constructive
3 trust claim back to the misrepresentations that are the basis
4 of their UTPA claim.

5 THE COURT: You're saying that they're limited to
6 certain damages under the UTPA -- well, "damages" as a
7 colloquial term under the UTPA, such as increased collection
8 efforts, and that's it, or you don't know what they're able to
9 get?

10 MR. ALDERMAN: No, that's not exactly my position.
11 Instead what I'm saying is if they -- you might look at this as
12 one claim, several categories of relief, if you could tie each
13 category of relief to the harm that they allege. So if there's
14 a way to tie their request for a constructive trust to a
15 misrepresentation --

16 THE COURT: Right. So your idea is that the
17 constructive trust is untethered, unconnected to any UTPA-based
18 liability?

19 MR. ALDERMAN: Yes, Your Honor. That's why I view it
20 as a separate claim. It's as if they're just sliding it under
21 the rug, bringing it along but trying to call it a UTPA claim
22 when, in fact, really it's just a claim for benefits.

23 THE COURT: So the argument you're facing is -- from
24 your opponent I think goes something like this: That we think
25 we're going to be entitled to some money by way of a form of

1 damages under the UTPA. We don't know how much yet.

2 And so if that turns out to be true, then your client
3 owes Providence money. Then to the degree that there is still
4 money headed from the plan or its administrator -- through its
5 administrator to the estate, the equitable relief sought is to
6 impose a sort of a -- almost a holding pattern on that money
7 until we know how the damages -- the money can be paid by way
8 of damages straight to plaintiff.

9 So I guess the substitute would be a straight claim
10 for UTPA, with a sort of a standard claim for damages wouldn't
11 invoke an equitable trust but might result down the line in an
12 equitable trust anyway someday just in equity, right? I mean,
13 it's the -- you could, by seeking UTPA damages, eventually a
14 court could end up imposing an equitable trust on money that's
15 floating out there, just to make sure the damages get paid,
16 right?

17 I guess I'll phrase it slightly differently. Your
18 contention is that because they seek an equitable trust of
19 money that would normally flow between the plan and the estate,
20 that since that's an ERISA-based relationship, this must be an
21 ERISA claim. And what if instead the UTPA claim just sought
22 typical UTPA relief by way of money and left it silent? Where
23 would you be?

24 MR. ALDERMAN: Well, actually, I think there's an
25 exhibit to Mr. Olson's declaration. It's the first letter I

1 sent to Mr. Olson before we filed the notice of removal, where
2 I specifically said if you'll remove that claim and maybe a
3 couple of other allegations, we wouldn't remove it, because
4 that is the problem is this claim for benefits here. I think
5 that's what you're asking. If they're not making a claim for
6 benefits disguised as constructive trust, along then with the
7 UTPA claim, we wouldn't even be here in this court because we
8 wouldn't have filed a removal.

9 THE COURT: You'd be litigating whether you violated
10 UTPA and whether you owed any money for it?

11 MR. ALDERMAN: Yes, Your Honor.

12 THE COURT: And you'd say we didn't violate, but even
13 if we did, we don't owe you as much as you claim, or we don't
14 owe you anything, right?

15 MR. ALDERMAN: We would certainly raise all those
16 defenses.

17 THE COURT: So my question is if that is where you
18 would have been, then I'm not clear. I think maybe the answer
19 is that you and your opponent view what's happening with the
20 equitable trust dramatically differently. If it's true that
21 the equitable trust doesn't claim any particular amount and
22 doesn't advocate for any particular outcome in the debate
23 between the plan and the estate, but only says, well, however
24 this plays out, hang on to the money, because if at the end of
25 the day ELAP owes Providence money, we want some of that money.

1 So you don't view that as an accurate description of
2 the claim for equitable trust, right?

3 MR. ALDERMAN: I don't. I know that --

4 THE COURT: You take the position that they're
5 actually taking a position in some maybe vague way about what
6 ought to happen in that debate about whether the plan owes the
7 estate more money, right?

8 MR. ALDERMAN: Yes, Your Honor. And I'm basing that
9 not on the motion that was filed or the reply that was filed,
10 where -- I think I pointed out in the opposition papers, they
11 recharacterized this constructive trust in their motion
12 originally, and then they recharacterize it again in the reply.

13 But just looking at the language here, it asks the
14 Court to enter an order in equity requiring ELAP hold all
15 amounts which the plan owes or would have owed to Pahalad's
16 estate under the plan and constructive trust. And skipping
17 down, it talks about, under the terms of the plan, not -- it's
18 not talking about some hypothetical case that may happen in the
19 future or may not, it's talking about --

20 THE COURT: You read it as advocating that the plan
21 does, in fact, presently owe the estate money?

22 MR. ALDERMAN: Yes, Your Honor.

23 THE COURT: And the theory for why to be developed
24 later?

25 MR. ALDERMAN: I can only imagine that they are

1 familiar enough with the principles of ERISA and how plans work
2 that they think the terms of the plan require payment of more
3 money.

4 THE COURT: So today in court, counsel for Providence
5 says that's not what this claim seeks to do. Counsel for
6 Providence acknowledges that, in fact, it takes no position --
7 according to Providence today in court, it takes no position on
8 how the plan ought to be interpreted in the debate between ELAP
9 and the estate and, in fact, takes no position as to whether
10 any money is, in fact, owed. It claims to be agnostic about
11 that. It might be zero, it might be a lot.

12 If I take counsel at his word there, as in that that
13 is now binding on Providence, then why isn't that the way in
14 which I should today read the claim?

15 MR. ALDERMAN: Well, I think for one reason --

16 THE COURT: I guess to put it another way, why
17 haven't you essentially won that battle through oral argument
18 today by a concession that money owed doesn't mean that any
19 money is, in fact, owed; it's completely agnostic about the
20 outcome?

21 MR. ALDERMAN: I think to some extent we have won
22 that battle based on that concession if they're not
23 claiming they're entitled to any benefits under the plan, but
24 they're claiming only that they're asking for the Court --

25 THE COURT: Not to put it too finely, but it's not so

1 much that they're saying not entitled to any benefits under the
2 plan. They're saying whatever may happen, we take no position
3 on that. We are going to make no arguments about what ought to
4 happen, but if it turns out that money is owed by the plan to
5 the estate, since the estate owes us money, we want some of
6 that money if it ever happens.

7 That's the interpretation today. So why isn't that,
8 since that's now binding on Providence, your concern -- in
9 fact, part of why you filed your motion was the idea that you
10 now faced another adversary in fighting about what the plan
11 does or doesn't owe the estate.

12 If that turns out not to be the case, you in fact
13 face a -- sort of a disinterested bystander who just waits to
14 see if any money is owed, then, one, shouldn't I interpret the
15 claim that way, and then, two, if I do, having really sort of
16 achieved at least a partial victory there, but also a defeat to
17 your motion?

18 MR. ALDERMAN: I think the --

19 THE COURT: Let's start with the first question.
20 It's easier. Shouldn't I interpret the claim in light of
21 counsel's binding expressions about what the claim does or
22 doesn't do?

23 MR. ALDERMAN: I don't have the case prepared to cite
24 to you because this wasn't something we briefed, but I believe
25 the law is that when you are evaluating this claim for purposes

1 of whether you have jurisdiction, you're confined to the
2 pleadings, and the pleadings say they want a constructive trust
3 around what the plan owes or would have owed. And that's
4 different than what Mr. Olson said today. I acknowledge that
5 he's changed it.

6 THE COURT: Well, I think instead I would say it's
7 susceptible possibly to more than one meaning, and he has
8 defined which meaning it has in a binding way. You're
9 suggesting that despite him saying that, you run some risk that
10 it could be interpreted otherwise, and therefore are entitled
11 to the possibility that that might happen.

12 I see zero risk right now that any court could in
13 this particular case interpret the complaint any other way than
14 what he has described today.

15 MR. ALDERMAN: I agree with that. They could not
16 come back after today and take a position that they're claiming
17 entitlement to any benefits.

18 You spoke a minute ago and said not to slice it too
19 finely, maybe they're not saying they're not entitled to any
20 benefits. I think they are saying they're not entitled to any
21 benefits. I think they would be interested in a constructive
22 trust based on the arguments today on some specific fund of
23 money that may exist in the future but not plan benefits,
24 because if they're entitled to plan benefits, then this is a
25 claim for benefits under ERISA. So I think it is accurate,

1 based on the way we're now recharacterizing paragraph 5 of the
2 prayer for relief that they're not claiming any entitlement to
3 plan benefits whatsoever.

4 THE COURT: You mean somehow plan benefits paid
5 directly to them as benefits? What they're asking for is --
6 when I say they're agnostic, the position your opponent has
7 staked out is they don't know if your client owes the estate
8 any money or ever will. That is being litigated before me and
9 may be done being litigated, we don't know. That's the
10 position on which they're agnostic. They don't know how it's
11 going to pan out, the fight between your client and the estate.
12 But if that fight turns out to award the estate some money,
13 Providence wants that money because the estate owes it to
14 Providence. That's their argument.

15 So that's the way in which the claim which you said
16 was based on the plan, staking out a position that the plan
17 does, in fact, today owe the estate more money has been
18 circumscribed.

19 Anyway, I appreciate your arguments.

20 MR. ALDERMAN: Thank you, Your Honor.

21 THE COURT: So I do want to clarify. Counsel, you've
22 corrected me on this, and you're right. I talked about *Barr v.*
23 *Ross Island*, which does have two parts to it, complete and
24 conflict preemption, but the two-part test we've been talking
25 is *Aetna Health v. Davila*. So I don't want to confuse anybody

1 there. You all sounded like you knew what I was saying, even
2 though I was saying it wrong. So I appreciate you doing that.
3 But the test I'm talking about is not the two parts of *Barr* but
4 the two parts of *Aetna*.

5 And so focusing on that two-part test, I do think
6 that the important thing is to look at the claims themselves,
7 and so therefore to formally hold what I held earlier, I don't
8 think the claim here is a claim that could have been brought
9 under ERISA. The arguments are subtle ones, and I'm not
10 suggesting it can never be the case that seeking a particular
11 sort of remedy doesn't really reveal the true nature of your
12 claim, but here I think the true nature of the claim is fairly
13 grounded in the UTPA and not ERISA.

14 And I do that, candidly, in part based on counsel for
15 Providence's description of what the claim is really seeking,
16 because I think we'd be even closer and maybe even over the
17 line on complete preemption if, in fact, the equitable trust
18 language in the complaint was read to assert that the plan owes
19 the estate money, that there is a theory by which the plan owes
20 the estate money and has wrongfully failed to pay that money
21 under the plan. That would be an ERISA claim.

22 But having disavowed that in what I view as a binding
23 way, I don't think it's currently a fair reading of the claim,
24 nor really in my view was it the most likely reading of the
25 claim originally.

1 So with that in mind, I don't think this claim is one
2 that is an ERISA claim in disguise or could have been brought
3 under ERISA. I think it implicates in particular ways
4 independent legal duties under the UTPA not found in ERISA, and
5 that's sort of without the need, I think, to find any kind of
6 contractual or other relationship between ELAP and Providence.
7 I think that's a sort of a freestanding, almost societal
8 commercial duty codified in the UTPA.

9 The second part of the claims that do raise concerns
10 about ERISA are the paragraphs I've mentioned seeking
11 injunctive relief. That does seem to require at least the
12 possibility of interpreting the plan to grant or deny the
13 requested injunctive relief. But I think it's accurate to say
14 that that's a question for a later date of conflict preemption
15 not complete presumption. So we'll just have to see how that
16 plays out at a later date.

17 I therefore think that Providence has the better of
18 this argument as to whether this is really grounded in ERISA.
19 I say "better of the argument," however, without finding a
20 sufficient basis to award attorney fees. The argument I think
21 is a close one, with a reasonable foundation for making it. In
22 fact, it turns out, I think, that for my analysis, the
23 clarification provided by counsel at oral argument becomes a
24 relatively important piece of the puzzle and couldn't have been
25 known in advance in a way that would trigger attorney's fees

1 because the argument against -- because removal was not
2 objectively reasonable. Therefore, I deny the request for the
3 sanction of attorney fees.

4 Anything further from Providence today?

5 MR. OLSON: Nothing, Your Honor.

6 THE COURT: From defendants?

7 MR. ALDERMAN: No, Your Honor.

8 THE COURT: Thank you. We'll be adjourned.

9 THE CLERK: This court is adjourned.

10 (Proceedings concluded.)
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

--o0o--

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

July 19, 2017

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE